SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 886

UNITED JEWISH APPEAL OF GREATER NEW YORK, INC.; UNITED JEWISH APPEAL, INC.; FEDERATION OF JEWISH PHILANTHROPIES OF NEW YORK and ASSOCIATION POUR LE RETABLISSEMENT DES INSTITUTIONS ET OEUVRES ISRAELITES EN FRANCE ET DANS SES POSSESSIONS D'OUTREMER (A.R.I.F.) INC.,

Petitioners,

v.

LEON SCHAEFLER, as Executor of the Last Will and Testament of ALBERT L. KING, Deceased; LEON SCHAEFLER and FIRST NATIONAL CITY BANK, as Trustees under the Last Will and Testament of GRACE KING, Deceased, and THE SALVATION ARMY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Joseph T. Arenson, on behalf of Petitioners, prays that a writ of certiorari issue to review the Order on Remittitur of the Court of Appeals of the State of New York, entered in the Surrogate's Court of the State of New York, County of New York, on October 1, 1968.

Opinions Below

The opinion of the Surrogate's Court of the State of New York, County of New York, is officially reported at 52

Misc. 2d 1021 and unofficially at 277 N. Y. S. 2d 281. The opinion is annexed hereto as Appendix "A", pages 11 to 17.

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is officially reported at 28 App. Div. 2d 1121 and unofficially at 285 N. Y. S. 2d 566. The decree of the Surrogate's Court was affirmed without opinion. The dissent of Mr. Justice Owen McGivern is set forth in Appendix "B" annexed, page 18.

The opinion of the Court of Appeals of the State of New York is officially reported at 22 N. Y. 2d 456 and unofficially at 293 N. Y. S. 2d 273. The opinion is annexed hereto as Appendix "C", pages 19 to 26.

Jurisdiction

The order of the Surrogate's Court, New York County, on Remittitur from the Court of Appeals was made and entered on October 1, 1968. A copy thereof is annexed hereto as Appendix "D", pages 27 to 29. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

Questions Presented

Section 2207 of the Internal Revenue Code of 1954 (26 U. S. C. §2207) grants to an executor the right to recover pro rata contribution for payment of estate taxes from the recipient of property that was included in the decedent's estate by reason of his possession of a power of appointment taxable under Section 2041 of the Code (26 U. S. C. §2041). Section 2207 IRC by its terms is applicable whether such inclusion is based on the decedent's exercise or non-exercise of that power. In the case at bar

the decedent had such a testamentary power which he did not exercise. As a result, the corpus of the fund passed under the instrument creating such power, the Will of his predeceased wife.

The issue presented to the Surrogate's Court by Respondent Executor and Respondent Trustees dealt with the decedent's intention as to apportionment of estate taxes between the decedent's testamentary estate and the appointive fund as well as among the beneficiaries of the appointive fund.

The Surrogate's Court held that had the decedent intended to provide directions with respect to such apportionment he could do so only through exercise of his testamentary power of appointment, which power he did not and could not exercise under his last Will.

After affirmance of the Surrogate's Court by the Appellate Division, the Court of Appeals reversed, holding that Section 2207 IRC gave the decedent the "power" to vary the estate tax burden independent of his testamentary power of appointment and that the decedent had exercised such "power." The question of the decedent's intention or whether he exercised such "power" is not a subject for this Court. What is at issue is the existence of such federal "power."

The questions presented are:

1. Whether Section 2207 IRC was intended by Congress to give a testator a federally created partial statutory power of disposition over property independent of that granted under the instrument creating the power or under state law.

2. Whether Section 2207 IRC was intended by Congress to give a testator a federally created statutory "power" to

control the disposition of property not owned or subject to the control of such decedent and thereby to deprive the person to whom such property would otherwise have passed of a partial interest in such property, in contravention of Amendment V of the Constitution.

3. Whether Section 2207 IRC was intended by Congress to give a testator a federally created statutory "power" that enables him to determine the devolution of property at his death, an area of authority not delegated to the federal government under the Constitution and thereby reserved to the states under Amendment X of the Constitution.

Constitutional Provisions and Statutes

The provisions of Amendments V and X of the United States Constitution (U. S. Const. amends. V and X) and Section 2207 of the Internal Revenue Code of 1954 (26 U. S. C. §2207) are set forth in Appendix "E", pages 30 to 31.

Statement

This matter arose in a proceeding for the construction of the Last Will and Testament of Albert L. King, Deceased. The basic facts, which are not in dispute, are as follows:

Albert L. King executed his Last Will and Testament on October 1, 1958. On the same day his wife, Grace King, executed her own Last Will and Testament. Grace King died on April 2, 1963, leaving her husband surviving her. Her Will was admitted to probate in the Surrogate's Court, New York County on April 23, 1963. Thereafter, her husband, Albert L. King, kept his October 1, 1958 Will

in force. At his death on March 8, 1966 that Will was admitted to probate by the Surrogate's Court, New York County.

Under the provisions of his wife's Will, one-half of the residue of her estate was left in trust for Albert L. King, over which he was given a testamentary power of appointment. The exercise of that power of appointment was limited by Grace King's Will to a testamentary exercise by a Will executed after the death of Grace King.

Albert L. King's Will, as noted above, was executed during his wife's lifetime. In addition, it expressly provided in Article "Fourth" thereof that it was not to operate as an exercise of the power of appointment granted under Grace King's Will. As a consequence the corpus of the appointive fund passed pursuant to the provisions of Grace King's Will applicable in the event of her husband's default in exercise of the power of appointment.

In Article "Seventh" of his Will, Albert L. King set forth provisions dealing with the apportionment of estate taxes imposed on his estate at his death.

The contention of Respondent Executor and Respondent Trustees in the Surrogate's Court was that the decedent in Article "Seventh" intended to require (a) that his testamentary estate not bear any greater estate tax burden than would have been imposed on his estate had he not had such power of appointment and (b) that with respect to the taxes apportionable against the corpus of the appointive fund, the same be paid as an administration expense, that is prior to division into the shares provided under his wife's Will.

Said Respondents maintained that the decedent was able to effectuate his intention, among other reasons, under the authority of Section 2207 IRC. The Surrogate in his

decision below held that whatever the decedent's intention, he could only effectuate it under the power of appointment granted by his wife. This the Court held he did not and could not do under his October 1, 1958 Will and by so holding, the Court rejected Respondents' argument that Section 2207 IRC gave the decedent a further, statutory power.

The Appellate Division, First Department, affirmed the Surrogate with but a single dissent on the issue of apportionment between the decedent's testamentary estate and the appointive fund as a whole.

The Court of Appeals by a four to three decision reversed, holding that independent of the testamentary power of appointment Section 2207 IRC empowered the decedent to (a) charge the appointive fund with more than its pro rata share of tax and (b) to direct how the tax shall be apportioned within the appointive fund. The Court found that the introductory phrase in Section 2207 IRC, "unless the decedent directs otherwise in his Will," was the vehicle whereby the decedent could exercise a "power" over property he did not own and chose not to control.

Raising the Federal Question

The question of the construction of Section 2207 was raised by Respondent Executor and Respondent Trustees in their memorandum of law submitted in the construction proceeding instituted by them in the Surrogate's Court, New York County (the Court of first instance) and responded to by Petitioners in their reply memorandum. The question of the construction of Section 2207 IRC was considered, discussed and disposed of by the Surrogate (Appendix "A", pages 11 to 17).

The same issues were raised in the memorandum of law submitted by the parties in the appeal to the Appellate Division. The affirmance of the decree of the Surrogate's Court was without opinion. The dissent of Mr. Justice McGivern (Appendix "B", page 18) discusses and construes Section 2207 IRC.

The memorandum of law submitted by the parties in the appeal to the Court of Appeals again raised the question of the construction of Section 2207 IRC. The opinion of the Court of Appeals considered, discussed and disposed of the appeal on the basis of the construction of Section 2207 IRC. (Appendix "C", pages 19 to 26)

Reasons for Granting the Writ

1. The construction of Section 2207 IRC by the Court of Appeals was erroneous because it renders its application unconstitutional under Amendment V and Amendment X of the United States Constitution.

The Court of Appeals construed Section 2207 IRC as enabling the testator to charge the property to which Section 2207 IRC relates with more than its pro rata share of tax and also as enabling the testator to adjust the tax burden within the fund in any manner he desires. Section 2207 IRC has thus been interpreted to have created a limited "power of appointment" in the testator, independent of the power created under his wife's Will. It is a "power" over property the testator did not own and could only control if he exercised the testamentary power of appointment. The statutory "power" permitted the testator to impose a larger share of the tax burden on the trust corpus than is determinable under the apportionment formula contained in Section 2207. Similarly, the court below found that that "power" permitted the decedent to

adjust the taxes among the remaindermen. The exercise of that "power" served to decrease the amount otherwise available for distribution to the trust remainderman and to increase the amount available for distribution to the beneficiaries of the decedent's testamentary estate. It also permitted the testator to take property from one remainderman and give it to another. In short, a federal statute has been construed by the Court of Appeals as authorizing a decedent to deprive a person of property not owned by the decedent or subject to his control. Such construction, we contend is erroneous because it is contrary to Amendment V of the Constitution.

The constitutionality of Section 2207 IRC has not been brought in question before this or any other Court. Its apparent constitutional basis lays in Congress' power to lay and collect taxes (Article I, Section 8). The construction given below, however, goes beyond the collection of estate taxes and would establish a federally created substantive power with respect to the devolution of private property, a power not granted to the federal government under the Constitution. Such construction, we further contend, is erroneous because it is contrary to Amendment X of the Constitution.

It is not our contention that Section 2207 IRC is unconstitutional. Rather, if given its apparent meaning as intended by Congress, namely, that by directing otherwise a testator can relieve the appointive fund of the apportionment burden imposed by statute, the validity of the statute is not subject to question and adheres to the principle announced by this Court that in the interpretation of a federal statute it is the duty of the Court to reach a conclusion which will avoid serious doubt of its constitutionality (*United States* v. *Rumley*, 345 U. S. 41 (1952)).

2. The court below decided an important question of federal law which has not been settled by this Court. There is no indication in the legislative history of Section 2207 IRC, its companion Section 2206 IRC (26 U. S. C. §2206, dealing with apportionment against life insurance beneficiaries) and 2205 IRC (26 U. S. C. §2205, dealing with reimbursement from the testamentary estate of taxes paid by a non-testamentary beneficiary), as well as the predecessors of those sections found as far back as the 1916 Revenue Act, that Congress sought to do anything more than provide for collection of the tax in a fair and equitable manner. The statute itself does not speak of compelling the recipients of appointive property to contribute to the payment of federal estate taxes. Rather it grants to the executor a right to recover a share of the taxes from such beneficiaries. In this context the introductory phrase "unless the decedent directs otherwise in his Will" serves merely to permit the decedent to deprive his executor of the right to compel contribution.

Neither this Court nor any other Court has heretofore interpreted the introductory phrase of Section 2207 IRC or the nature of the right or power such phrase may be said to establish in a testator. The question is a novel one which Petitioners respectfully submit should be decided by this Court.

3. Furthermore, aside from the questionable constitutionality of the interpretation given by the Court of Appeals and the novelty of the question, the issues presented are of importance in the administration of the federal estate tax law. The Courts of other states may or may not view the statute in the same manner as the New York Court of Appeals. The question of how the statute should properly be interpreted is a matter of import in the determination of the amount of federal estate

tax imposed upon the estate of a decedent. In a case, such as the instant case, the so-called "power" to shift the tax burden is a material factor in the determination of the amount of the charitable deduction since to the extent that the charities' share is reduced by payment of estate taxes the charitable deduction will be reduced [26 U. S. C. §2055(c)]. Similarly, the so-called "power" can vary the amount of the marital deduction since the marital deduction also is to be reduced if any estate taxes are payable from property received by the surviving spouse [26 U. S. C. §2056(b)(4)(A)].

In the absence of a determination by this Court the Courts of each state will be free to decide whether or not such a "power" is created by the statute and thereby reach inconsistent conclusions on one of the elements essential in the computation of the charitable and marital deductions, a result based not on a state determination of a matter within its province, but on the construction of a federal statute.

Conformity thus will not be assured without a determination by this Court.

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APPENDIX "A"

Opinion of Surrogate S. Samuel Di Falco
52 Misc. 2d 1021

S. SAMUEL DI FALCO, S. The executor of the decedent's estate has instituted this proceeding for construction of the decedent's will. The following facts are pertinent to the issues, are undisputed and may help bring into focus the difficulties attendant upon a resolution of the problems presented

The testator, a resident of Paris, France, albeit a citizen of the United States died on March 8, 1966. The value of his gross estate located in New York County at the time of his death was approximately $88,000. In addition there must be included in his estate for estate tax purposes a trust valued at approximately $2,500,000 over which he had a general testamentary power of appointment (Internal Revenue Code, §2041).

The power of appointment was derived by the decedent from his wife, Grace, also a resident of France and a citizen of the United States who died on April 2, 1963 leaving a will which was admitted to probate in this court. Under her will a marital deduction trust was created of one half of her residuary estate with the income thereof payable to the decedent for life. The principal of the trust in default of his exercise of the power of appointment was payable one third to four named charities and two thirds to a secondary trust for the benefit of their daughter Louise. The only condition placed upon the decedent by his wife with respect to his exercise of the power of appointment was that such power be exercised by a will executed *after* her death. This the decedent failed to do.

To avoid any question as to the law applicable to the administration of Grace's estate due to her residence in France her will contains a direction pursuant to the provisions of section 47 of the Decedent Estate Law providing that New York State law shall apply to the testamentary distributions made therein and to the construction thereof.

Our courts have been consistent in their rulings that the construction of a will insofar as it affects the exercise of a power of appointment is governed by the law of the donor's domicile. (*Matter of New York Life Ins. & Trust Co.*, 209 N. Y. 585; *Matter of Harriman*, 124 Misc. 320, affd. 217 App. Div. 733; *City Bank Farmers Trust Co.* v. *Meyn*, 263 App. Div. 671; *Matter of Vanderbilt*, 180 Misc. 431, affd. 269 App. Div. 820, affd. 295 N. Y. 964; *Matter of Deane*, 4 N. Y. 2d 326, 331.) In the case at bar, the donor chose the law of the State of New York, the situs of the property, to control the interpretation and construction of her will and that direction is valid and must be complied with. (*Matter of Cook*, 204 Misc. 704, affd. 283 App. Div. 1047; *Matter of Sahadi*, 30 Misc. 2d 166, affd. 283 App. Div. 1012; *Wyatt* v. *Fulrath*, 16 N. Y. 2d 169.) This eliminates from consideration any question of conflict of laws arising out of the decedent donee's nonresidence.

Grace's will and the decedent's will in respect of which a construction is sought are both dated October 1, 1958. The decedent also left a will dated April 11, 1963, some nine days after Grace's death which specifically disposed of his French assets valued at approximately $2,000. The decedent's French will makes no mention of the power of appointment but the decedent's American will specifically states: "I hereby expressly declare that this will is not to operate as an exercise of the power of appoint-

ment given to me in and by the Last Will and Testament of my wife—Grace King."

The construction sought is concerned with an interpretation of article Seventh of the decedent's will which reads as follows: "Seventh: All taxes payable by reason of my death on my estate and on any transfer or other item of value (exclusive of any property over which I may have power of appointment, whether exercised, not exercised or released) shall be paid, without apportionment, as an administration expense out of my residuary estate and shall be limited to the amount which would have been payable on my estate without such appointable property. The entire excess of such taxes over the amount payable in accordance with the provisions of the preceding sentence shall be paid from the principal of my property over which I have power of appointment by the Trustees thereof." A reading of the quoted paragraph clearly discloses that the decedent's main concern was in exempting his own estate from the impact of additional taxes caused by the inclusion of the appointive property therein.

The question is whether the testator, who did not intend to exercise the power of appointment and who in fact did not exercise such power, could burden the appointive property with the excess tax generated by the lumping of *his* estate's assets with the appointive property. To put is more simply, although it must be conceded that a testator may place the burden of taxes on nontestamentary property on his own probate estate, it does not necessarily follow that the reverse is true.

Had the testator executed his will after his wife's death pursuant to her testamentary direction with respect to the exercise of the power, the court would have been in a position to hold that there had been a partial exercise by the testator of the power of appointment to the extent neces-

sary to exonerate and exempt his estate from the additional taxes generated by the power of appointment. However, the fact is that the testator did not avail himself of the opportunity to exercise the power of appointment either partially or otherwise and under the circumstances the court doubts the validity of his attempt to shift the tax burden to nontestamentary assets over which he had no dominion or control.

A search of authority in support of the proposition that a testator may shift the burden of taxes from his testamentary estate to nontestamentary assets has met with little success. The cases cited by the petition in support of this position are not applicable and the general statements made by authors of texts which appear to support the theory are not persuasive and have not been enacted into law by either our State Legislature or the Congress of the United States.

When the testator executed his will on October 1, 1958, he could not exercise any dominion over the appointive property as his power to do so was limited, by the terms of Grace's will, to the execution of a will *after* her death. Only after her death on April 2, 1963 did the testator have the power to dispose of the property by will (Real Property Law, §148; *Farmers' Loan & Trust Co.* v. *Mortimer,* 219 N. Y. 290; *Matter of Kennedy,* 279 N. Y. 255; *Matter of Cary,* 44 Misc. 2d 929). At that time there was vested in him as an agent of the donor, his wife, only the right to designate the beneficiaries of the fund which would pass directly to the appointees (*Matter of Walbridge,* 178 Misc. 32; *Matter of Baldwin,* 139 N. Y. S. 2d 413; *Hirsch* v. *Bucki,* 162 App. Div. 659). The testator chose not to exercise the power vested in him and in making that decision the court holds that he lost the right to shift the excess tax burden on his estate

to the appointive property. The tax must, therefore, be ratably apportioned between the decedent's residuary estate and the appointive fund (*Matter of Rogers,* 249 App. Div. 238, mot. for lv. to app. den. 273 N. Y. 680), and the executor will be required to pay the taxes allocable to the decedent's own testamentary estate without contribution from the appointive fund.

The second question raised in this proceeding is whether the tax payable on the appointive fund is to be paid out of the fund without apportionment as an administration expense or whether there is to be an apportionment within the fund which would give the charities the entire benefit of the charitable deduction on the property payable to them.

This question is not one which is properly determinable in this proceeding in the donee's estate. Due to the death of the decedent, the trust of the appointive fund is now distributable by the trustees appointed by the donor pursuant to the terms of the donor's will. This court having determined that the taxes must be ratably apportioned between the testator's residuary estate and the appointive fund, these trustees are now faced with the problem of how and to whom the allocable tax is to be charged and a proceeding to determine that issue should properly be brought by the trustees in the donor's estate. Nevertheless, in order to avoid further litigation with increased expense to both estates and as all parties having an interest in the outcome of the controversy are before the court and have argued the matter and as the donor Grace King's will was admitted to probate here, the court will dispose of the matter in this proceeding.

As the provisions of the testator's will as to the payment of taxes are ineffective with respect to the appointive property and as the directions for the payment of taxes

in the donor's will are only applicable to taxes payable in her estate upon her death, the issue must be decided under the existing statutes and by the application of equitable principles.

A dispute exists as to whether the provisions of section 2207 of the Internal Revenue Code or section 124 of the Decedent Estate Law are applicable to the problem presented and as to the interpretation to be given to these statutes in relation to the problem.

There has been general agreement among the courts confronted with the issue that with two exceptions all problems of apportionment of taxes should be determined by the courts of the State of the testator's domicile. These exceptions relate to property subject to powers of appointment and proceeds of life insurance policies. With respect to these it would appear that sections 2206 and 2207 of the Internal Revenue Code would be controlling (*National State Bank of Newark* v. *Nadeau,* 57 N. J. Super. 53; *Kintzinger* v. *Millin,* 254 Iowa 173; *Riggs* v. *Del Drago,* 317 U. S. 95; 55 Col. L. Rev. 261, 264, 289).

Unless there is a contrary direction in the will, section 2207 of the Internal Revenue Code creates a liability in the recipients of the appointive property for the payment of taxes on property over which the decedent had a power of appointment and authorizes the executor of the donee's estate to recover from each recipient their proportionate share of the tax paid. Section 124 of the Decedent Estate Law, contains similar provisions, but in addition thereto provides for a credit to be given to each legatee for any exemption granted by the taxing statute to such legatee. Despite the fact that there is no conflict between the statutes if the donee's will is controlling and, as we have found, there is no effective direction with respect to taxes upon the appointive property therein,

then the apportionment decreed under section 2207 of the Internal Revenue Code might leave some doubt as to whether the charities are entitled to receive the appointive share completely free of tax. It appears to this writer at least that the question requires legislative adjustment.

Lacking such legislative direction at this time it is the opinion of the court that equity requires the appointive property now distributable to the charities to be delivered to them free of taxes. In determining the value of the taxable estate under section 2001 of the Internal Revenue Code all bequests and legacies to charities are deductible from the gross estate (Internal Revenue Code, §2055). The gifts to charity, therefore, not only do not generate any estate taxes but in fact benefit the other recipients of the appointive property by lowering the total of the taxable estate. In *Matter of Shubert* (10 N. Y. 2d 461, 473) the court quoted with approval the following language from *Matter of Wahr* (370 Pa. 382, 387): "As none of the gifts to the charities contributed to the federal tax burden, it is just and equitable that such charitable gifts should be relieved from the payment of any part of such tax". This finding is in accord with the expressed Federal and State legislative intent to encourage gifts to charity (*Edwards* v. *Slocum,* 264 U. S. 61; *Gardiner* v. *Hassett,* 63 F. Supp. 853).

APPENDIX "B"

Dissenting Opinion of Justice Owen McGivern
28 App. Div. 2d 1121

I dissent from the majority to the extent that I do not espouse the conclusion that the modest estate of the testator, Albert L. King, should be saddled by the higher tax rates resulting from the inclusion of the appointive property in his estate. In my opinion, the appointive property is liable for at least its proportionate share of the tax on Albert's taxable estate, under section 2207 of the Internal Revenue Code (U. S. Code, tit. 26, §2207). This statute, as does section 124 of the New York Decedent Estate Law, provides that there shall be an apportionment of the total tax *unless the testator directs otherwise in his will.* And that is precisely what the testator did. He directed that his probate estate should pay only the amount of tax which would have been payable by his estate if he had not had a power of appointment and he ordered that the excess, or the amount actually generated by the power of appointment, be paid out of the appointive fund. He invoked the statutory privilege and he directed that the tax burden be borne by the asset which generated it. To that extent, he did what the statutes permitted him to do, he liberated his own probate estate of an undue burden, and having acted within the statute, his testamentary direction should be honored. As to the second question: whether there is to be an apportionment within the fund which would give the charities the entire benefit of the charitable deduction on the property payable to them, I would affirm the Surrogate and concur with the majority.

APPENDIX "C"

Opinion of Court of Appeals

SCILEPPI, Judge.

Albert and Grace King executed their respective wills on October 1, 1958. Paragraph Eighth of Grace's will created a marital-deduction trust, the income of which was payable to her husband, Albert, for life. Albert was given a testamentary power of appointment over the principal of the trust which could only be exercised by a will executed after Grace's death. The principal of the trust, in default of a valid exercise of the power of appointment was payable, one third to four named charities (the respondents herein) and two thirds to a secondary trust for the benefit of their daughter Louise. Grace King died on April 2, 1963 and her will was admitted to probate by the Surrogate's Court, New York County.

As previously stated, Albert King executed a will, dated the same day as his wife's, disposing of his assets located in New York County. This will is the subject of the instant dispute. By his will, testator left all of his property located in New York County to his daughter outright. The will expressly declares that it is not to operate as an exercise of Albert's power of appointment. Testator recognized, however, that the appointive property would be included in his estate for estate tax purposes (Internal Revenue Code, §2041), and he made the following provision regarding the tax burden. "Seventh: All taxes payable by reason of my death on my estate and on any transfer or other item of value (exclusive of any property over which I may have power of appointment, whether exercised, not exercised or released) shall be

paid, without apportionment, as an administration expense out of my residuary estate and shall be limited to the amount which would have been payable on my estate without such appointable property. The entire excess of such taxes over the amount payable in accordance with the provisions of the preceding sentence shall be paid from the principal of the property over which I have power of appointment by the Trustees thereof."

Testator died on March 8, 1966 leaving a gross estate of approximately $88,000. Since testator never exercised his power of appointment, the principal of the marital-deduction trust valued at approximately $2,500,000, passed pursuant to the terms of Grace King's will.

The entire tax on Albert's estate (exclusive of the appointive property) is approximately $1,600. When the appointive property is added to the gross estate for estate tax purposes, however, the tax amounts to about $697,000. Albert's executor and the trustees of the secondary trust for the daughter, relying on article Seventh of Albert's will, concluded that: (a) the appointive fund should bear the entire excess tax generated by the power, (b) the fund's share of the tax should be paid one third by the charitable recipients and two thirds by the secondary trust. When some of the charities disagreed with this conclusion, this construction proceeding was brought.

The Surrogate concluded that the testator could not shift the excess tax burden which was generated by the power of appointment to the appointive property. Consequently, he held that the entire tax must be ratably apportioned between the testator's residuary estate and the appointive fund. He also held that the appointive fund's share of the tax must be borne by the secondary trust and the charities must receive their appointive share completely free of tax.

The Appellate Division affirmed. Justice McGivern dissented in part, being of the opinion that the testator could validly direct that the appointive fund bear the taxes generated by the power of appointment.

We have concluded that the courts below were in error and consequently the order appealed from should be reversed.

(1) Generally speaking, apportionment of taxes among the beneficiaries of an estate, or among persons receiving property which is included within an estate for tax purposes, is a matter of State law (Matter of Zahn, 300 N. Y. 1, 10, 87 N. E. 2d 558, 561, 10 A. L. R. 2d 652). There are, however, two exceptions to this general rule. The apportionment of taxes attributable to nonexempt insurance proceeds and property subject to a power of appointment is governed by Federal law (Riggs v. Del Drago, 317 U. S. 95, 63 S. Ct. 109, 87 L. Ed. 106, 142 A. L. R. 1131; National State Bank of Newark v. Nadeau, 57 N. J. Super. 53, 153 A. 2d 854; Kintzinger v. Millin, 254 Iowa 173, 117 N. W. 2d 68; Scoles, Apportionment of Federal Estate Taxes and Conflict of Laws, 55 Col. L. Rev. 261, 286).

Section 2207 of the Internal Revenue Code deals with the apportionment of taxes generated by a power of appointment. It provides:

"Liability of recipient of property over which decedent had power of appointment.

"Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, non-exercise, or release of a power of appointment such portion of the total tax paid as the

value of such property bears to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2052, or section 2106(a), as the case may be. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section."

The Surrogate correctly concluded that section 2207 controlled, but he was of the opinion that the testator could not burden the appointive property with the excess tax without exercising his power of appointment. To cull from his opinion:

"(T)he testator did not avail himself of the opportunity to exercise the power of appointment either partially or otherwise and under the circumstances the court doubts the validity of his attempt to shift the tax burden to nontestamentary assets over which he had no dominion or control.

* * *

"When the testator executed his will on October 1, 1958, he could not exercise any dominion over the appointive property as his power to do so was limited, by the terms of Grace's will, to the execution of a will *after* her death. Only after her death on April 2, 1963 did the testator have the power to dispose of the property by will (Real Property Law, section 148; Farmers' Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 114 N. E. 389;

Matter of Kennedy's Will, 279 N. Y. 255, 18 N. E. 2d 146; Matter of Cary's Will, 44 Misc. 2d 929, 255 N. Y. S. 2d 419). At that time there was vested in him as an agent of the donor, his wife, only the right to designate the beneficiaries of the fund which would pass directly to the appointees (Matter of Walbridge's Estate, 178 Misc. 32, 33 N. Y. S. 2d 47; Matter of Baldwin's Will, Sur., 139 N. Y. S. 2d 413; Hirsch v. Bucki, 162 App. Div. 659, 148 N. Y. S. 214). The testator chose not to exercise the power vested in him and in making that decision the court holds that he lost the right to shift the excess tax burden on his estate to the appointive property. The tax must, therefore, be ratably apportioned between the decedent's residuary estate and the appointive fund" (52 Misc. 2d 1021, 1024—1025, 277 N. Y. S. 2d 281, 284).

We are of the opinion that the Surrogate's interpretation of section 2207 of the Internal Revenue Code is far too restrictive. There is no doubt that the testator could have shifted the burden of tax generated by the power of appointment to the appointive property if he had exercised the power (Matter of Rogers, 249 App. Div. 238, 291 N. Y. S. 815, mot. for lv. to app. den. 273 N. Y. 680, 291 N. Y. S. 815; Hooker v. Drayton, 69 R. I. 290, 33 A. 2d 206, 150 A. L. R. 723 [1943]). In the above two cases, the testators were allowed to shift the tax burden to appointive property even in the absence of any statutory authority providing for such apportionment. There it was recognized that, although tax statutes include appointive property in a donee's estate for the purpose of taxation, a bequest which passes to a beneficiary *either through the exercise of a power or by reason of a failure to exercise the power*, passes to the beneficiary from the creator and not from the donee of the power. It was also recognized that, if a donee could not shift the taxes generated by the power of appointment to the appointive property, his own estate would be diminished, often to the detriment

of the natural objects of his bounty, by taxes on property which was not his and which did not pass under his will.

(2) Clearly, Congress had these very same considerations in mind when it enacted section 2207 of the Internal Revenue Code. Congress, in enacting section 2207, not only mandated a prorata apportionment of taxes between appointive and nonappointive property, but it also gave the donee of the appointive property the option of directing otherwise. The statutory language "Unless the decedent directs otherwise" is broad in scope and should be liberally construed. It does not restrict the testator to the option of directing no apportionment. It also allows him to charge the appointive property with more than its prorata share of the taxes (cf. Union Trust Co. v. Watson, 76 R. I. 223, 68 A. 2d 916 [1949]). This is precisely what the testator in the case at bar did. He directed that the appointive property bear the entire burden of the taxes generated by the power. It does not matter that the testator did not exercise his power, for the considerations which prompted Congress to enact section 2207 are present whether or not the power is exercised. Thus the appointive property must bear the entire burden of the taxes generated by the power of appointment.

(3) We must now determine if the tax payable by the recipients of the appointive fund should be ratably apportioned between the charitable and noncharitable recipients. The Surrogate recognized that section 2207 of the Internal Revenue Code authorizes the executor of a donee's estate to recover from recipients of appointive property a proportionate share of the tax paid. He was uncertain, however, if Congress intended, in the absence of a specific directive by the donee, to charge charitable recipients of appointive property with a prorata share

of taxes attributable to a power of appointment. Lacking what he considered to be a specific directive from the testator and lacking clear legislative intent, the Surrogate concluded that equity requires the appointive property distributable to the charities to be delivered to them free of taxes.

We are of the opinion that the charitable recipients must pay their prorata share of the taxes payable by the appointive fund. In arriving at this conclusion we find it unnecessary to determine if Congress intended to exonerate charitable recipients from bearing their proportionate share of taxes payable by the recipients of appointive property, for section 2207 clearly states that the testator may make a direction which is contrary to congressional intent.

The second sentence of article Seventh of the testator's will states: "The entire excess of such taxes (those attributable to the appointive fund) over the amount payable in accordance with the provisions of the preceding sentence shall be paid from the *principal* of the property over which I have power of appointment" (emphasis added). We think that it is clear from this language that the testator intended the charities to bear their prorata share of the taxes. The testator did not direct that the taxes attributable to the appointive fund be paid only from that portion of the principal passing to the secondary trust. To the contrary, he treated the principal as a single fund and made no distinction between the shares of principal distributable to the charities and the share distributable to his daughter's trust.

Respondents, relying on Matter of Shubert, 10 N. Y. 2d 461, 225 N. Y. S. 2d 13, 180 N. E. 2d 410 argue that article Seventh of the testator's will does not constitute a clear, unambiguous direction that the charities shall bear their proportionate share of the taxes attributable to the

appointive fund. Matter of Shubert (supra) is not controlling. In that case, we held that the charitable recipient of a residuary bequest was exonerated from paying its prorata share of the taxes attributable to residuary assets. There, however, we were applying section 124 of the Decedent Estate Law, Consol. Laws, c. 13, which provides that "any exemption or deduction allowed under the law imposing the tax * * * by reason of the charitable purposes of the gift *shall inure to the benefit of the person * * * receiving such * * * charitable gift*" unless the testator directs otherwise in his will (emphasis added). Faced with this strong policy of statutory exoneration, we held that the testator's direction to the contrary had to be clear and unambiguous. In the case at bar, however, we are not dealing with a statute which expresses a strong policy in favor of exoneration. While it is true that Congress encourages charitable bequests by providing for their deduction from gross estates (Internal Revenue Code, §2055), it is also true that it has specifically recognized that a charity may have to contribute to a tax, in which event the amount contributed is not allowable as a charitable deduction (Internal Revenue Code, §2055, subd. [c]).

To conclude it is our opinion that article Seventh of decedent's will was effective (1) to shift the entire burden of taxation generated by the power of appointment to the appointive fund; and (2) to direct that the charitable recipients pay their prorata share of the taxes payable by the appointive fund.

Accordingly, the order appealed from should be reversed.

Fuld, C. J., and Bergan and Jasen, J. J., concur.

Burke, Keating and Breitel, J. J., dissent and vote to affirm on the Surrogate's opinion.

APPENDIX "D"

Order on Remittitur

At the Surrogate's Court of the County of New York, at the Hall of Records in said County, on the 23rd day of September 1968.

Present:

HON. S. SAMUEL DI FALCO,
Surrogate

Filed Oct. 1, 1968

File No. 2074—1966

Construction Proceeding, Will of
ALBERT L. KING,
Deceased.

Leon Schaefler, as Executor of the Last Will and Testament of Albert L. King, deceased, and Leon Schaefler and First National City Bank, as Trustees of the trust created under Paragraph Eighth (A) of the Last Will and Testament of Grace King, deceased, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Department, made and filed on November 30, 1967, which affirmed a decree of this Court made on March 29, 1967 and filed on April 3, 1967;

And the said appellants having appeared on the said appeal by their attorneys, Messrs. Finch & Schaefler, who served and filed a brief and a reply brief and argued the cause;

And respondents United Jewish Appeal of Greater New York, Inc. and United Jewish Appeal, Inc. having appeared by their attorneys, Messrs. Goodell, Moss & Rose, who served and filed a brief and argued the cause;

And respondent Federation of Jewish Philanthropies of New York having appeared by its attorneys, Messrs. Arenson & Gelinas, who joined in the said brief served and filed on behalf of respondents United Jewish Appeal of Greater New York, Inc. and United Jewish Appeal, Inc.;

And respondent Association pour le Retablissement des Institutions et Oeuvres Israelites en France et dans ses Possessions d'Outremer (A.P.I.F.) Inc., having appeared by its attorney, Rene Loeb, who served and filed a brief and argued the cause;

And the Court of Appeals having heard the said appeal and having rendered its decision in writing reversing the said order of the Appellate Division, with costs payable out of the trust estate to all parties appearing separately and filing separate briefs, and having remitted the matter to this Court for further proceedings in accordance with the opinion by the Court of Appeals, and the remittitur having been duly filed;

Now, on motion of Messrs. Finch & Schaefler, attorneys for the appellants, it is

ORDERED AND DECREED that the order of the Court of Appeals be, and the same hereby is, made the order of this Court and that the said order of the Appellate Division and the said decree of this Court be, and they hereby are, reversed; and it is further

ORDERED AND DECREED that Leon Schaefler, as Executor aforesaid, pay out of estate assets the federal estate tax payable on the taxable estate of Albert L. King out of

the residuary estate of Albert L. King, deceased, limited, to the amount which would have been payable if the gross estate of Albert L. King for federal estate tax purposes had not included the the power of appointment granted to him by the Last Will and Testament of Grace King, deceased; and it is further

ORDERED AND DECREED that Leon Schaefler and First National City Bank, as Trustees aforesaid, pay the entire excess of the federal estate tax payable on the taxable estate of Albert L. King out of the principal of the said trust as an administration expense without apportionment; and it is further

ORDERED that the following parties be allowed the following amounts as and for their reasonable counsel fees and their costs and disbursements, and it is directed that Leon Schaefler and First National City Bank, as Trustees aforesaid, pay the said amounts to the attorneys for the said parties out of the principal of the said trust as administration expenses without apportionment:

Party	*Attorneys*	*Counsel Fees*	*Costs and Disbursements*
Leon Schaefler, as Executor aforesaid, and Leon Schaefler and First National City Bank, as Trustees aforesaid	Finch & Schaefler	$5,000.00	$562.94
United Jewish Appeal of Greater New York, Inc. and United Jewish Appeal, Inc. and Federation of Jewish Philanthropies of New York	Goodell, Moss & Rose) and Arenson & Gelinas)	$5,000.00	$471.15
Association pour le Retablissement des Institutions et Oeuvres Israelites en France et dans ses Possessions d'Outremer (A.R.I.F.) Inc.	Rene Loeb	$2,500.00	$274.19

S. SAMUEL DI FALCO
Surrogate

APPENDIX "E"

Constitutional Provisions and Statutes

U. S. Constitution:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTE: INTERNAL REVENUE CODE

§2207. LIABILITY OF RECIPIENT OF PROPERTY OVER WHICH DECEDENT HAD POWER OF APPOINTMENT

Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the taxable

estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2052, or section 2106(a), as the case may be. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section. Aug. 16, 1954, c. 736, 68A Stat. 402.